

CHAN KIEW*a*

v.

LAI SANG & ANOR

HIGH COURT MALAYA, TEMERLOH

b

RAMLY ALI JC

[CIVIL SUIT NO: 22-18-2001]

24 SEPTEMBER 2001

CIVIL PROCEDURE: Affidavits - Affidavit in support of application - Deponent's failure to describe his occupation - Whether a mere irregularity - Whether O. 41 r. 1(4) Rules of the High Court 1980 complied with - Jurat - Interpreter's name appeared only once in first column - The word "dia" used in second column - Whether can safely conclude the word "dia" refers to same interpreter - Rules of the High Court 1980, O. 41 r. 1(7) - Whether interpreter required to sign jurat - Deponent illiterate in Bahasa Malaysia - Proper form of jurat to be used - Non-compliance with O. 41 r. 3 Rules of the High Court 1980 - Whether defect curable - Rules of the High Court 1980, O. 2 r. 1, O. 41 rr. 1, 3, 4, Form 78(c), (d)

*c**d*

The plaintiff had filed his summons-in-chambers ('encl. 4') for an injunction to restrain the defendants from entering and working on a piece of land that belonged to him. To support his application, the plaintiff filed two affidavits. The issues that arose were: (i) whether failure to state the deponent's occupation or description in the affidavits as required under O. 41 r. 1(4) of the Rules of the High Court 1980 ('RHC') is fatal or just a mere irregularity which can be cured; (ii) whether failure to insert the name of the interpreter twice in the relevant columns in Form 78(d) of the RHC amounts to an irregularity; (iii) whether the interpreter named in Form 78(d) of the RHC need to sign the jurat therein; (iv) what is the appropriate form of jurat to be used in cases where the affidavit is in Bahasa Malaysia and the deponent does not understand the language used; and (v) whether a certificate under O. 41 r. 3 of the RHC is required where the deponent is illiterate and whether such affidavit without the certificate can be accepted by the court.

*e**f**g***Held:**

- [1] The deponent had described that he is the plaintiff in the action and the owner of the said land in dispute. The deponent had thus complied with O. 41 r. 1(4) of the RHC. Also, the deponent's failure to describe his "occupation" is only a mere irregularity which can be cured under O. 41 r. 4 of the RHC. (p 73 d-e)

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- a* [2] The interpreter's name, Suum Yoke Ling, appeared only once in the first column. In the second column where the interpreter's name should appear again, the jurat had used the word "dia", instead of repeating the interpreter's name. Reading the jurat in the whole context, one can safely conclude that the word "dia" refers to the interpreter whose name had appeared earlier. Therefore, the jurat is not defective. The jurat have been "completed by the person before whom it is sworn" as prescribed in O. 41 r. 1(7). (p 75 a-b)
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- c* [3] There is no requirement that the interpreter need to sign the jurat. The jurat is a certification by the person who administer the oath or affirmation *ie* the Commissioner for Oath, not by the interpreter. The contents of the jurat clearly shows that it is the commissioner for oath who makes the certification not the interpreter. Therefore, only the Commissioner for Oath need to sign the jurat. (p 75 d-e)
- d* [4] For the purpose of the present affidavits which were affirmed fully in Bahasa Malaysia, the deponent is considered as illiterate as he does not understand Bahasa Malaysia. Therefore, the proper form of jurat to be used is as in Form 78(c) and not as in Form 78(d). (p 76 e)
- e* [5] Since the deponent is illiterate in Bahasa Malaysia, all the requirements under O. 41 r. 3 of the RHC must be complied with. The jurat used in both the said affidavits was based on Form 78(d). In that format, there is no certification by the person who administered the oath *ie* the Commissioner for Oaths, as to all the three requirements required under O. 41 r. 3. In a situation where the deponent is illiterate and Form 78(c) is applicable, the person administering the oath must certify the three requirements stipulated. In the present jurat (as in Form 78(d)) there is a certificate to say that the affidavits were interpreted to the deponent in Mandarin, by the named interpreter. But there was nothing to indicate that the deponent seemed perfectly to understand the contents of the affidavit. (pp 76 g & 77 c-d)
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- g*
- h* [5a] The jurats in both the affidavits in question failed to comply with the requirements under O. 41 r. 3 of the RHC. The defect is serious and cannot be cured under O. 41 r. 4 as well as under O. 2 r. 1 of the RHC. Therefore, both the affidavits in question cannot be used in evidence for the purpose of the plaintiff's encl. 4 in this proceeding. (p 78 d)

[Plaintiff's application dismissed with costs.]

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Case(s) referred to:

Gan Thing Phing v. Ong Gek Kim (No 2) [1999] 7 CLJ 146 (**refd**)

Han Eeu Tiam v. Phang Kui Fatt [1999] 4 CLJ 395 (**refd**)

Lim Goh Huat v. Saw Keng See [1998] 6 MLJ 600 (**fol**)

Metro Kajang Construction Sdn Bhd v. Eka Bahtera Sdn Bhd [2001] 3 CLJ 951 (**refd**)

S Ravi G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor
[1995] 2 CLJ 152 (**fol**)

Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn Bhd [1994] 2 CLJ
729 (**refd**)

Legislation referred to:

Rules of the High Court 1980, O. 1 r. 7, O. 2 r. 1, O. 41 rr. 1(4), (7), (8), 3, 4

Other source(s) referred to:

Chamber Concise Dictionary

Collins Pocket Dictionary

Shorter Oxford English Dictionary

For the plaintiff - Richard Bong; M/s Bong & Co

For the defendants - Ho Weng Seng; M/s Rosni, Francis Tan & Ho

Reported by Suhainah Wahiduddin

JUDGMENT**Ramly Ali JC:****Background**

The plaintiff filed his summons-in-chamber (SIC) on 28 July 2001 (encl. 4) for an injunction to restrain the defendants from entering and working on his 4,327 sq. ft. land at H.S.(M) 3709, PT 4369, Mukim Pelangai, Daerah Bentong, Pahang Darul Makmur. To support his application, the plaintiff filed two affidavits, namely: affidavit-in-support sworn by the plaintiff personally on 13 July 2001 and affidavit tambahan, also sworn by the plaintiff on 24 August 2001.

Preliminary Objections By The Defendants

Before hearing the said SIC, the defendants raised preliminary objections to the effect that:

- (i) the affidavits do not comply with O. 41 r. 1(4) of the Rules of the High Court 1980 (RHC 1980), as the deponent's occupation or description is not stated therein;
- (ii) the affidavits do not comply with O. 41 r. 1(7) and (8) of the RHC 1980 in that the jurat therein is defective;

- a* (iii) the affidavits do not comply with O. 41 r. 3 of the RHC 1980 in that the jurat used is inapplicable as the deponent is or is deemed to be illiterate.

Issues To Be Determined

- b* After going through the relevant affidavits and submissions by both counsels for the plaintiff and defendants, I found that there are several issues that need to be considered and determined by the court. The issues are as follows:

- c* (i) whether failure to state the deponent's occupation or description in the affidavits as required under O. 41 r. 1(4) of the RHC 1980, is fatal or just a mere irregularity which can be cured;
- d* (ii) whether failure to insert the name of the interpreter twice in the relevant columns in Form 78(d) of the RHC 1980 amounts to an irregularity. If so, whether it can be cured;
- e* (iii) whether the interpreter named in Form 78(d) of the RHC 1980 need to sign the jurat therein;
- (iv) what is the appropriate form of jurat to be used in cases where the affidavit is in Bahasa Malaysia and the deponent does not understand the language used;
- (v) whether a certificate under O. 41 r. 3 of the RHC 1980 is required where the deponent is illiterate; and whether such affidavit without the certificate can be accepted by the court.

Findings Of The Court

- f* I shall now deal with all the issues raised.

Order 41 r. 1(4) Of The RHC 1980

Order 41 r. 1(4) states:

- g* (4) Every affidavit must be expressed in the first person and must state the place of residence of the deponent and **his occupation or, if he has none, his description**, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state the fact.

- h* The defendants argued that the deponent has failed to state his occupation in both the affidavits or his description as required under O. 41 r. 1(4). The defendants submitted that if the deponent has no occupation, he must state his description and the "description" must refer to "his occupation" ie, whether he is "a pensioner" "un-employed" or "housewife", etc. With respect, I cannot agree with this submission. The words "his description" in O. 41 r. 1(4) is

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only applicable when the deponent has no occupation. If he has an occupation, he must state so, and thus “his description” does not arise at all. If he has no occupation, then he must state “his description”. “His description” is different from “its description”. In the proper context of O. 41 r. 1(4), “his description” must refer to the description of the deponent, not description of the occupation. If it is meant to be description of the occupation, then the words used should be “it’s description”. In any event, it is illogical for the deponent to “describe his occupation” when he has none. In the present case, the deponent has deposed in both the affidavits that:

1. Saya adalah Plaintiff dan seorang Tuanpunya tanah dalam tindakan ini.

2. ...

3. Saya adalah Tuanpunya tanah yang dikenali sebagai H.S.(M) 3709, P.T. 4369, MUKIM PELANGAI, DAERAH BENTONG, PAHANG DARUL MAKMUR dengan keluasan sementara sebanyak 1.214 hektar.

With the above description, I am of the view of that the deponent has sufficiently “described” himself as required under O. 41 r. 1(4). He has described that he is the plaintiff in the action and the owner of the said land in dispute. Therefore, I am satisfied that the deponent has complied with O. 41 r. 1(4), of the RHC 1980. In the event I am wrong in coming to this finding, the deponent’s failure to describe his “occupation” as submitted by the defendants, is only a mere irregularity which can be cured under O. 41 r. 4 of the RHC 1980. It does not prejudice the defendants.

Name Of Interpreter In Form 78(d)

Order 41 r. 1(7) and (8) of the RHC 1980 provides as follows:

(7). Every affidavit must be signed by the deponent and the jurat must be completed and signed by the person before whom it is sworn.

(8). A jurat must be in one of the forms in Form 78.

Both the affidavits in question used jurat as in Form 78(d). The format is as follows:

(d) To an affidavit by a person who does not understand English. Sworn (or affirmed) on the ... day of ... at ... through the interpretation of ... (if the interpreter is not a Court Interpreter add the following:

the said ... having been first sworn that he had truly, distinctly, and audibly translated the contents of his affidavit to the deponent ... and that he would truly and faithfully interpret the oath (or affirmation) about to be administered unto him the said

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Before me

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Commissioner for Oath

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Even though Form 78(d) refers to an affidavit by a person who does not understand “English”, but in this case the word “English” should read “Bahasa Malaysia”. In this context, RK Nathan J has given the same ruling in *Gan Thing Phing v. Ong Gek Kim* (No. 2) [1999] 7 CLJ 146.

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In the present case, the jurats used in both the affidavits are based on the format in Form 78(d). Except for the dates of affirmation, both the jurats in the affidavits are identical, and reproduced below:

(Title as in action)

JURAT*d*

Berkenaan dengan Affidavit seseorang yang tidak memahami Bahasa Malaysia. Diikrarkan pada ... hb ... 2001 di Temerloh, Pahang Darul Makmur, melalui penterjemahan oleh SUUM YOKE LING (No. K/P: 781116-06-5426) yang tersebut setelah mula-mula sekali bersumpah bahawa dia telah sebenarnya dengan nyatanya dengan dapat didengar menterjemahkan isi kandungan Affidavitnya kepada Deponen CHAN KIEW (No. K/P: 7706943) dalam bahasa Mandarin bahawa dia akan sebenarnya sejujurnya menterjemahkan ikrar yang sedang hendak dikendalikan keatas dirinya tersebut itu.

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SUUM YOKE LING

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Di hadapan saya

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Pesuruhjaya Sumpah

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The defendants contended that the interpreter’s name should appear **twice** in the jurat. They cited the decision in *Metro Kajang Construction Sdn. Bhd. v. Eka Bahtera Sdn. Bhd.* [2001] 3 CLJ 951 to support their contention.

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Strictly speaking, going by the book, I do agree that the interpreter’s name should appear **twice** in the jurat in Form 78(d), as marked “(name of interpreter)”, because the format has provided two columns to be filled in with the interpreter’s name. However, O. 1 r. 7, of the RHC 1980, allows application of the forms with such variations as the circumstances of the particular case require. Order 1 r. 7 provides:

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The Forms in Appendix A shall be used where applicable with such variations as the circumstances of the particular case require.

In the present case, the interpreter's name "Suum Yoke Ling" appears only once, ie, in the first column. In the second column where the interpreter's name should appear again, the jurat used the word "dia", instead of repeating the interpreter's name again. Reading the jurat in the whole context, one can safely conclude that the word "dia" refers to the same interpreter whose name appeared earlier ie, "Suum Yoke Ling". Therefore, I am of the view that the jurat is not defective, on this ground. By doing so, the jurat can be said to have been "completed by the person before whom it is sworn" as prescribed in O. 41 r. 1(7). It is not misleading to use the word "dia" instead of repeating the interpreter's name in the jurat. No one is prejudiced. If at all the affidavits are said to be not complying with the jurat in Form 78(d) as argued by the defendants, such non-compliance, at most, can only be considered as a mere irregularity which, again, can be cured under O. 41 r. 4 of the RHC 1980.

Interpreter's Signature In The Jurat

During the course of submission, a question has also been raised whether the interpreter named in the jurat as in Form 78(d) needs to sign the said jurat. I am of the view that there is no requirement that the interpreter needs to sign the jurat. The jurat is in fact, a certification by the person who administers the oath or affirmation ie, the Commissioner for Oath, not by the interpreter. The contents of the jurat clearly shows that it is the Commissioner for Oath who makes the certification not the interpreter. Therefore, only the Commissioner for Oath needs to sign the jurat. Form 78(d) (for that matter, all the other forms in Form 78), do not provide for specific column for the interpreter's signature in the jurat. If the interpreter signed the jurat, it would be awkward and out of context. It is not advisable.

Form 78(c) And Order 41 Rule 3

The more pertinent issue raised by the parties in this case is on the question whether the jurat in both the affidavits in question should have used Form 78(c) or Form 78(d). The defendants submitted that the proper jurat to be used is as in Form 78(c), not as in Form 78(d), because the affidavits are in Bahasa Malaysia and the deponent being a Chinese, is illiterate in Bahasa Malaysia.

In the present case, it is not disputed that the deponent in both the affidavits is a Chinese who could not understand Bahasa Malaysia. The jurat used in both the affidavits clearly show that the deponent does not understand Bahasa Malaysia. The affidavits were interpreted to him in Mandarin by the interpreter. This is further supported by the evidence in the signature of the deponent which was in Chinese characters.

Form 78(c) is for an affidavit by an illiterate or blind person. For a better understanding of the contents of the form, it is necessary to reproduce the said Form 78(c):

- a** (c) To an affidavit by an illiterate or blind person: ... sworn (or affirmed) on the ... day of ... at

I, having truly, distinctly and audibly read over the contents of the above affidavit (add if exhibits are referred to in the affidavit “and explained the nature and effect of the exhibits therein referred to”) to the said deponent who

- b** seemed perfectly to understand the same and who made his mark thereto in my presence (Through the interpretation of ...)

Before me

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Commissioner for Oaths

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In the rules, the word “illiterate” is not defined or explained. It is therefore necessary to refer to the natural and ordinary meaning of the word as found in the dictionary. In *Chamber Concise Dictionary*, the word “illiterate” means “unable to read”. While, in *Collins Pocket Dictionary*, it means “not knowing

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how to read or write.” In *Shorter Oxford English Dictionary*, the same word means “one who is unable to read”. In the context of the affidavit in Bahasa

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Malaysia as affirmed by the deponent, it must mean that the deponent is unable to read or write Bahasa Malaysia. Thus the deponent in this case is said to be illiterate as far as Bahasa Malaysia is concerned. He may be literate in

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Chinese characters, but for the purpose of the present affidavits which were affirmed fully in Bahasa Malaysia, the deponent must be considered as an illiterate. Therefore, the proper form of jurat to be used is as in Form 78(c),

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not as in Form 78(d). Since the deponent cannot understand Bahasa Malaysia, the contents of the affidavit must be interpreted to him in the language that

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he understands (in this case, Mandarin) by a competent interpreter, and thereafter, that part of the form which reads: “(Through the interpretation of ...)” must be completed accordingly. The full name of the interpreter (together

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with his identity card number) and the language used by him to interpret the contents of the affidavit to the deponent must be recorded in the blank spaces provided in the brackets. (See: *Han Euu Tiam v. Phang Kui Fatt* [1999] 4 CLJ 395).

Since the deponent is an illiterate in Bahasa Malaysia, all the requirements under O. 41 r. 3 of the RHC 1980 must be complied with. Order 41 r. 3 provides:

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where it appears to the person administering the oath the deponent is illiterate or blind, he must certify in the jurat that:

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(a) the affidavit was read in his presence to the deponent;

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(b) the deponent seemed perfectly to understand it; and

(c) the deponent made his signature or mark in his presence;

and the affidavit shall not be used in evidence without such a certificate unless the Court is otherwise satisfied that it was read to and appeared to be perfectly understood by the deponent.

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In the present case, the jurat used in both the affidavits in question is based on Form 78(d). In that format, there is no certification by the person who administered the oath ie, the Commissioner for Oaths, as to all the three requirements required under O. 41 r. 3. In a situation where the deponent is illiterate and Form 78(c) is applicable, the person administering the oath must certify the three requirements stipulated above. In the present jurat (as in Form 78(d)), there is a certificate to say that the affidavits were interpreted to the deponent in Mandarin, by the named interpreter. But there is nothing to indicate that the deponent seemed perfectly to understand the contents of the affidavit. In this respect, I am in full agreement with Abdul Kadir Sulaiman J in *Lim Goh Huat v. Saw Keng See* [1998] 6 MLJ 600, when he said (at p. 609):

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In a situation where the deponent is illiterate or blind, the person administering the oath must certify the three matters stipulated therein. There is a certificate to the effect that the said affidavit was read to the respondent. There was also in certificate that the affidavit was explained to her in Cantonese (Kong Fu). But by certifying such, it does not in any way mean that the deponent seemed perfectly to understand it, the second requirement needed under the rule. No doubt it was explained to her, but the question is whether she really understood what was being explained to her. In the circumstances, I rule that this affidavit in (a) is as well defective. As the defect in the two said affidavits are serious, they are inadmissible for the purpose of the evidence in support of her application for summary judgment against the appellant.

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All the three requirements under O. 41 r. 3 are mandatory in nature. They are not mere technicalities. Those requirements go to the core of the authenticity of the contents of an affidavit which are meant to be used as evidence in court. Just like a witness giving oral testimony in open court, a deponent in an affidavit must perfectly understand the contents of the affidavit and personally make his signature or mark in the presence of the person who administers the oath. The person who administer the oath must be satisfied that the deponent knowingly, and voluntarily signed the affidavit. Failure to comply with those requirements “will lead to chaos in the conduct of litigations”. (see: *Syarikat Telekom Malaysia Bhd v. Business Chinese Directory Sdn. Bhd.* (FC) [1994] 2 CLJ 729). In this respect, I am also in full agreement

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- a* with Low Hop Bing JC (as he then was) in *S Ravi a/l G Suppiah v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1995] 2 CLJ 152 when he said (at p. 153):

- b* Upon a proper construction of O. 41 r. 3, I have no hesitation in holding that the requirements of O. 41 r. 3 are clearly and obviously mandatory in nature. In order to use an affidavit under O. 41 r. 3, it is absolutely essential that the conditions prescribed therein have been meticulously complied with, as the person administering the oath (in Malaysia, usually a Commissioner for oaths, a Magistrate or a Session Court Judge) must certify that the aforesaid three conditions have been complied with, failing which the affidavit shall not be used in evidence.

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Conclusion

- d* In the present case, I am satisfied the jurats in both the affidavits in question failed to comply with the requirements under O. 41 r. 3 of the RHC 1980. The defect is so serious that it cannot be cured under O. 41 r. 4 as well as under O. 2 r. 1 of the RHC 1980. Therefore both the affidavits in question cannot be used in evidence for the purpose of the plaintiff's summons-in-chambers (encl. 4) in this proceeding. Thus, I hold that there is no evidence at all to support the plaintiff's application. On this ground alone, I dismiss the plaintiff's application *vide* summons-in-chambers (encl. 4) with cost. The plaintiff may file afresh.

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